SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 143.

THE DISTRICT OF COLUMBIA

vs.

ELIAS E. BARNES.

This was a suit brought in the Court of Claims against the District of Columbia under the act of June 16, 1880, to recover for work done and materials furnished in the improvement of the streets in the District of Columbia under the late Board of Public Works and the Commissioners appointed under the act of June 20, 1874.

The suit was commenced August 4, 1880, and has been in almost continuous litigation ever since. The judgment appealed from is the *third* rendered by the Court of Claims, and the present appeal is the second prosecuted by the District of Columbia to this court.

The statement of the case by the appellant (R., pp. 1–16) embodies much irrelevant and immaterial matter and is, to say the least, obscure and confusing. The learned counsel, not content with the transcript which he himself caused to be prepared and which embraces even more than the rule of court permits, seeks to incorporate into it findings of fact made by the Court of Claims at a former trial upon a different record and upon other evidence, and asks this court

to disregard the findings upon which this appeal rests and adopt something else, not part of the record, in lieu thereof.

It is submitted that all this extraneous matter sought to be thus brought into the case should be excluded and disregarded by the court and the case tried upon the record before it according to its established rules.

Statement.

The appellant's statement is so disregardful of the findings of fact and is so erroneous that it is necessary to restate the case here.

The suit was to recover for work and labor done in the improvement of some eight streets located upon Capitol Hill, in the District, partly under contracts in writing and partly under orders and directions of the Commissioners. The findings show a very large amount of work performed, upwards of $300,000, comprising innumerable items, very many, if not a large majority, not specified in any written contract, but all of it accepted by the Commissioners for the use and benefit of the District of Columbia.

The present judgment awards to the appellee compensation for the *exact* amount of work done and materials furnished, as measured and certified by the engineer's officers of the District, at the *exact* price which the officers of the District and the appellee understood and agreed at the time should be paid.

Very few of the many items allowed are attacked. The items objected to are:

First. The price allowed for hauling away a portion of the material excavated in the grading of North Carolina avenue, D street S. E., and Third street S. E.

Second. The price allowed for the excavation of stiff clay on North Carolina avenue.

Third. The price allowed for excavation of "old gravel streets" on part of D street and Third street.

Fourth. The amount of excavation allowed for on North Carolina avenue.

FIRST.

The facts as shown by the findings are: That in April, 1872, the Board of Public Works awarded (as shown by an entry in their minutes) a contract to the appellee to grade North Carolina avenue and D street between Fourth street and New Jersey avenue at prices fixed by the board, and the contract clerk was directed to prepare a contract accordingly (R., p. 17).

At that time it required an excavation of 32,739 cubic yards on North Carolina avenue and 4,267 cubic yards on D street, a total of 37,006 cubic yards, to bring these two streets to the then established grade (R., p. 19).

On the same day a formal written contract was entered into, which provided that the work should be completed within ninety days from the first day of May, 1872, and that the price to be paid was thirty cents per cubic yard for each yard of "earth, sand or gravel" excavated, and one cent for each two hundred feet the excavated material should be hauled away. No price was fixed for the excavation of any other class of material found in the excavation (contract, finding 1, R., pp. 18–19).

The appellee proceeded with the work, and on the 2d of August, 1872, within the ninety days, completed the grading of both streets (finding 3, R., p. 19).

On May 21, 1873, a supplemental contract, called an extension of contract, was entered into at board rates, embracing, among other work, putting down the sidewalks and graveling the roadway of these two streets.

For more than two years the work remained in this condition, the grading completed and the sidewalks not laid.

On June 20, 1874, the Board of Public Works was abolished and Commissioners of the District appointed under that act. After the Commissioners assumed control in 1874, they decided, as they had a right to do, to change the grade of North Carolina avenue and establish a new grade. This change of grade involved cutting down North Carolina avenue some 64,573 cubic yards additional (finding 7, R., p. 21). And required the grades of the intersecting streets, D street and Third street, to be cut down to conform to the new grade. D street had to be excavated 20,752 additional yards, and Third street 22,248 additional yards (the original grade of Third street requiring a cut of 7,078 yards only—finding 13, R., p. 28). In short, the original amount of grading required on these three streets, under the terms of contract 264 and contract 413, amounted to 44,084 yards, all of which grading was done and completed under the Board of Public Works, and, for the grading so done, the appellee received exactly the contract price of one cent for every two hundred yards of haul. The amount of excavation added two years later by the establishment of a new grade was 107,573 additional yards, or a total of 151,657 yards.

Upon this state of facts the Commissioners in 1874 agreed with the appellee, who already had the contract to gravel and lay the sidewalks on all of these streets at their then existing grades, that he should do the additional excavation at the then current rates for work of that character, he to receive, in lieu of cash as provided under his original contract, certificates of indebtedness in payment for such work. The appellee agreed to it, proceeded with the work, was paid partial payments as the work progressed and completed it to the satisfaction of the District, and his work was accepted by the Commissioners and has been used for the benefit of the District ever since.

Before final settlement, however, the board of audit, which had the auditing of his accounts, was abolished by the act of March 14, 1876, and he remitted by the act of June 16,

1880, to the Court of Claims for a settlement, where his suit has been pending ever since.

The present judgment awards to the appellee the price that was current when the additional work was performed, and which is found by the court below to be fair and reasonable.

The appellant's assignment of errors disregards this entire state of facts, and, assuming that the appellee was under a binding contract to perform this additional work at the original price, contends that the Commissioners, without authority or consideration, increased the price, and that the court below held that the Commissioners were empowered to do so. The findings of the court contradict this assumption entirely. On the contrary, not only did the court hold the appellee down to the contract price wherever there was a written contract, but it went further, and, as to work done and settled for years before, set aside settlements and allowed the appellant to recover back $13,039.79 upon counter-claims for payments made to the appellee by the Board of Public Works in good faith because in excess of the prices stipulated in contract 413 (finding 17, R., pp. 30–31). The doctrine which the appellant contends for was enforced in its harshest and most rigid form against the appellee.

SECOND.

After the change of grading in 1874, which under the terms of the agreement with the Commissioners was to be paid for at the current prevailing rates, the appellee encountered a body of "stiff clay," of which he excavated upwards of 30,000 yards on North Carolina avenue, and the court has awarded him the usual and customary prices for this work, which the court finds to be a reasonable price (finding 8, R., p. 22).

As there was no contract existing in 1874 for the grading of North Carolina avenue, what has been said *supra* equally

applies to this item, but the complaint against it is still less substantial than to the price of the hauling, for in contract 264 there is no price fixed for any class of excavation except *earth, sand,* and *gravel,* and to be consistent the appellant must contend that the clay was to be excavated for nothing. There was no price fixed for clay excavation, and there is no reason to apply the price for either earth, sand, or gravel to it. Under that contract, it was a *casus omissus,* and the party would be entitled to recover a reasonable price for it. If the contract had been as in the case of Barnard, cited in the brief, that the party was to receive thirty cents per yard for each yard of *grading* done, that price might apply to any character of material excavated, but where the contract price applies only to a particular class of material and another class is encountered in an excavation, neither right nor reason would permit the application of such a price to the excavation of a material of a confessedly more expensive character.

THIRD.

The objection is apparently addressed to some portion of two small allowances on Third street and on D street, Third street aggregating $373.40 (item 9, R., p. 29) and D street aggregating $521.90 (item 2, R., p. 23).

The assignments of errors do not show what part or how much of these two items is objected to. The findings, however, show that on D street between *Second* and *Sixth* streets there were found 5,219 yards of "old gravel street" excavation, for which forty cents is allowed. How much of that excavation was done on that part of the street lying between Second and Fourth streets, which was embraced in contract 264, and how much of it was embraced on that portion of D street between Fourth and Sixth streets, which was embraced in the first extension of contract 264 of May 21, 1873, and which directly provides for this rate of forty cents, the find-

ing do not disclose. Whether any of it, or, if so, what portion of it, lay between Second and Fourth streets, the record is entirely silent.

As to Third street, the forty-cent grading is evidently embraced on that part of Third street between Virginia avenue and the Eastern branch under the extension of contract 413 of date of May 20, 1875 (R., p. 25), and which directly provides for board rates. It is not specially set forth in the findings on what section of the street it was, but inasmuch as the court has found that the section of the street embraced under the terms of the original contract 413 must be done at thirty cents and refused to reform that contract, and as there would be no "old gravel" street to be affected by the change of grade, all of that class of grading found on Third street between the limits of contract 413 must have been embraced in the 7,078 yards, the first grading done, for which thirty cents only was allowed; the forty-cent item must relate to the extension of contract

The objection to this item is a matter utterly indefinite.

It is submitted that the appellant must affirmatively show, *not* that he may possibly be injured, but that he has actually been injured and in some definite amount. This he utterly fails to do. It is with respect to this same item that contract 264 was reformed, this will be treated of later, in the brief.

FOURTH.

Objection is made as to the quantity of excavation allowed on North Carolina avenue. The court found as a matter of fact that the appellee performed the exact quantity of grading on North Carolina avenue, as shown by the measurements of the engineer under date of—

Aug. 9, 1872, 32,793 yards—Item 13, finding 9, R., p. 22;

M'ch 27, 1875, 20,438 yards—Item 15, finding 9, R., p. 22;

Dec. 2, 1875, 10,585.6 yards—Item 18, finding 9, R., p. 22;

Jan'y 22, 1876, 33,550 yards—Item 20, finding 9, R., p. 22;

aggregating 97,316.6 cubic yards of excavation.

As the original contract provided that the measurements should be made by the engineer of the District, it is difficult to comprehend what complaint the appellant can have in the premises. It is found as a fact by the court and is conclusive.

U. S. *vs.* Smith, 94 U. S., 218.

It seems, however, to be claimed that it is error because it is alleged that it is more in quantity than was claimed in one of the amendments to the original petition, and this seems to be the foundation of the assignment of error.

This is but another of the many errors of fact with which the appellant's brief bristles. The original petition, R., p. 1, claims a larger amount, although not in detail, but specifically refers to "measurements" on file with the District, and the last amendment of the petition, R., p. 12, claims exactly the amount allowed, so that the contention that it is not claimed in the petition is utterly without foundation. It is not shown nor pretended that it is more work than was actually performed. The objection seems to be founded on a refinement of pleading which does not nor never did obtain in the Court of Claims. This court and the Court of Claims in numerous cases have held that the strict rules of pleading do not obtain in that court. So that even if it were true that in the settlement of these numerous accounts a few yards more were allowed than was technically claimed, it would not avail the appellant.

In the case of The United States *vs.* Burns, 12 Wallace, 246, this court says: "The Court of Claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading." The same thing is held in the case of Clark *vs.*

The United States, 95 U. S., 539, and again reiterated in the case of United States *vs.* Behan, 110 U. S., 338. This same doctrine has been elaborated in opinions in the Court of Claims. The purpose of that court is not to hold claimants down to any special and technical rules of pleading, but if upon the whole case there appears to be a just and equitable demand, the court will allow it, although it had not been technically and critically stated in the petition.

Burk *vs.* U. S., 13 C. Cl's, 231.
Mfg. Co. *vs.* U. S., 16 C. Cl's, 296.
Brown *vs.* D. C., 17 C. Cl's, 303.

The appellee submits that there is absolutely no merit in this assignment of error.

This covers the technical objections to the assignment of error, aside from the attack upon the court of its jurisdiction to reform the contract under the act of June 16, 1880.

Reformation of Contract.

As is said in a previous part of this brief, it is not definitely shown that any part of the judgment rendered in this case was rendered upon a reformation of contract 264. The most that can be said is that there may be a possibility that some portion of item 2, on D Street work, could have possibly been embraced within the scope of the reformation of the contract—a matter at best of some two or three hundred dollars.

It seems almost a misfortune that the act of June 16, 1880, under which the Court of Claims has taken jurisdiction (X) and adjudicated the entire series of cases brought under that act during the last twenty-five years, should, in the very last case pending, have the jurisdiction that it has exercised for a quarter of a century challenged. In a very elaborate way the learned counsel has undertaken to discuss the jurisdiction of the court under the various grants of jurisdiction to it for the past half century, and, by asserting that the District of Columbia and the United States are identical, seeks to

(X) O'Hare v. D. C. 18 C. Cl's. 646.
Cullinane v. D.C. 18 C. Cl's. 577.
Shipman v. D. C. 18 C. Cl's. 291,
affirmed in 119 U.S. 148.

draw, from the various acts conferring jurisdiction upon the Court of Claims with reference to suits against the United States, some reason by which he can break down the plain words of the statutes conferring jurisdiction to hear and determine claims against the District of Columbia. His argument is lengthy, but neither convincing nor sound.

It appears to the appellee that the entire answer to his contention is found in simply reading the plain words of the act of 1880, which confers upon the Court of Claims original, equitable, and legal jurisdiction with respect to claims against the District. In the case of Harvey *vs.* The United States, 105 U. S., 671, the mere grant of equitable jurisdiction by special act to the Court of Claims in that case was held by this court to amply warrant the court below to reform the contract and to enter judgment under the contract so reformed. That case would seem to be conclusive against the contention of the appellant.

In the very elaborate brief of the appellant the learned counsel seems to have overlooked the fact that this court in the case of U. S. *vs.* Jones, 131 U. S., 18, distinctly held that under the Tucker act the Court of Claims was clothed with equity jurisdiction where the equitable demand arose out of a money demand, and under that act the Court of Claims held that it had such jurisdiction (South Boston Iron Co. *vs.* U. S., 34 Court Cl., 175; Milliken *vs.* U. S., decided at the present term of the Court of Claims, but not yet reported).

From every point of view it clearly appears that this judgment simply gives to this appellee the reasonable amount for the work and labor that he performed in the improvement of the streets of the District. His work was honestly and faithfully performed, and in the very language of the court has been accepted and used for the benefit of the appellant, and no just reason exists why he should not recover a reasonable compensation for his labor and materials. The judgment should be affirmed.

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